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RUEHLO/AMEMBASSY LONDON PRIORITY 2973
RUEHMO/AMEMBASSY MOSCOW PRIORITY 0311
RUEHFR/AMEMBASSY PARIS PRIORITY 2866
RUEHYN/AMEMBASSY SANAA PRIORITY 0491
RUEHTC/AMEMBASSY THE HAGUE PRIORITY 1056
RUEAWJA/DOJ WASHDC PRIORITY
RHMFIUU/CDR USCENTCOM MACDILL AFB FL PRIORITY
RHMFIUU/CJTF HOA PRIORITY
RHMFIUU/CDR USAFRICOM STUTTGART GE PRIORITY
RHMFIUU/HQ USAFRICOM STUTTGART GE PRIORITY

UNCLAS SECTION 01 OF 04 NAIROBI 002667

C O R R E C T E D C O P Y (PASSING INSTRUCTIONS)

SIPDIS

DEPT FOR AF, S/CT,
AF/RSA FOR MIKE BITTRICK AND JUN BANDO,
AF/E FOR SUSAN DRIANO AND NOLE GAREY
INL FOR SILENSKY
DOJ/OPDAT FOR ALEXANDRE/BERMAN/SILVERWOOD/KALASHNIKOVA
DOJ FOR CRIM DAAG SWARTZ

E.O. 12958: N/A

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NL, RS, YM, KE

SUBJECT: KENYANS MOVE AHEAD ON NEW PIRACY PROSECUTION

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¶1. (SBU) Summary: On November 11, the UK's Royal Navy seized eight Somali nationals in international waters off the coast of Yemen after the British responded to a distress call from a Danish ship that the Somalis had attempted to board. After proceeding to Mombasa, Kenya, the British relinquished custody of the suspected pirates to the Kenyan police on November 18. The next day, the suspects were charged with piracy in a Mombasa court, and the prosecutor asked that the defendants be held without bond. On November 24, the Chief Magistrate denied the defendants' bail request and set the trial date for December 11, giving the prosecution little time to organize its case and make foreign witnesses available. The prosecutor's office (the Department of Public Prosecutions, or DPP) is confident that the trial court will postpone the trial until the prosecution can present its witnesses. The DPP, which has given this case high priority, understands that there are likely more cases to come, and has asked post's Regional Legal Advisor (RLA) to assist in developing the capacity of the police and DPP to prosecute these cases. The DPP successfully tried a similar piracy case in 2007. End summary.

BRITS TRANSFER CAPTURED PIRATES

¶2. (SBU) On November 11, British naval assets picked up eight Somali nationals suspected of committing acts of piracy in international waters off the coast of Yemen. The UK government first contacted the Yemeni government to inquire whether Yemen could undertake the prosecution. However, the Yemeni government could not give assurances that the accused

would not face the death penalty. (Note: UK law forbids handing over suspects to a jurisdiction where they might face the death penalty. End Note.) Subsequently, the government of Kenya (GOK) agreed to accept the suspects for prosecution in Kenyan courts, where they face a maximum penalty of life imprisonment. The suspects were transferred to the Kenya Police Service (KPS) on November 18. They were arraigned in a Mombasa court on November 19.

13. (SBU) Also on November 18, Kenya's chief prosecutor Keriako Tobiko, the director of the Department of Public Prosecutions (DPP), asked the U.S. Department of Justice's Resident Legal Advisor (RLA) to provide advice and assistance with the prosecution. On November 19, the RLA met with personnel at the UK High Commission in Nairobi who were involved in the transfer of the prisoners, and the RLA was given copies of witness statements, photographs, and other relevant documents. On November 20, the RLA flew to Mombasa and met with the lead prosecutor for two days. They were later joined in reviewing the case by the director of the DPP.

14. (SBU) At a bail hearing on November 24, the magistrate hearing the case denied the defendants' request for bail, and directed that the case be expedited. The magistrate set the next hearing for December 11. An early December hearing allows little time for the prosecution to organize its case and to ensure that foreign witnesses will be present. However, the prosecution expressed confidence that the trial judge will grant a postponement until a time when the prosecution is able to present its witnesses.

BACKGROUND

15. (SBU) On November 8, 11 armed Somali pirates boarded and took control of a Yemeni dhow in international waters off the Yemeni coast. The pirates then used the dhow, which had a crew of seven Yemenis, as a base from which to launch their

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smaller skiff in attempts over several days to capture several larger commercial vessels. On November 11, the pirates attempted to board the Danish flagged merchant vessel Powerful, but this boarding failed when the pirates' boarding ladder dislodged and fell into the sea. Some of these events were witnessed by the crew members of a Russian frigate, the Neustrashimy, and of a Dutch merchant vessel, the Bremen Express, that had been nearby and responded to the Powerful's distress signals.

16. (SBU) The Royal Navy ship HMS Cumberland, which was conducting anti-piracy patrols in the area, responded to the Powerful's radio calls. Once the Cumberland arrived on the scene, the pirate skiff had rejoined the pirated dhow, and the dhow began to take evasive action despite clear directives from the Powerful for the dhow to stop. The dhow was piloted by the pirate leader, who continued to take aggressive actions. As a boarding party of Royal Marines approaching in speed boats, the pirates raised their rifles to fire on them. Gunfire was exchanged. Two pirates and one Yemeni crew member were shot and later died. The dhow was boarded by the Royal Marines. The Marines seized seven AK-47 assault rifles, one rocket-propelled grenade (RPG) launcher, a pistol, ammunition (including three RPG warheads), grappling hooks, and boarding ladders.

17. (SBU) The weaponry and all the occupants of the dhow were taken aboard the Cumberland and brief statements were taken from the six surviving Yemenis. The Cumberland later received orders to permit the Yemenis to return to Yemen in their dhow. The Cumberland escorted the Yemenis in their dhow to Yemeni territorial waters. The Yemenis took the body of their deceased crew member with them, and it is believed that he was later buried at sea. The Cumberland then proceeded to the Kenyan port of Mombasa. On November 18, the

British turned over the eight captured pirates, the bodies of the two deceased pirates and the seized evidence to the Kenyan police. (Note: One of the 11 pirates that initially seized the dhow was lost at sea, either during the attempted piracy of the Powerful, or during the firefight with the Royal Marines. End note.)

¶8. (SBU) The Kenyan police interviewed the pirates. The suspects claimed that they were fishermen who the Yemenis had befriended and were assisting to return to Somalia. On November 19, the eight Somalis were charged with piracy of the Yemeni dhow under the Kenyan penal code.

POTENTIAL LEGAL ISSUES

¶9. (SBU) The RLA has identified a number of legal issues and is working with the DPP to research and resolve them. Long-term solutions, legislative or juridical, should improve capacity to prosecute piracy, as well as crimes with similar features (for example, terrorism, trafficking in persons, and other transnational crimes).

¶10. (SBU) Section 69 of the Kenya Penal Code states that "(a)ny person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offense of piracy...(and is) liable to imprisonment for (up to) life." Two other sections of the penal code support the position that Kenya retains jurisdiction over piracy offenses committed on the high seas. The penal code, and the precedent of the piracy case tried in 2007, support jurisdiction in this case.

¶11. (SBU) In the current case, as in the 2007 case, the acts of piracy took place in international waters, and none of the

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individuals or crafts involved in the piracy or police action were Kenyan. The ten Somali pirates convicted in 2007 were all sentenced to seven years in prison; they have appealed and oral arguments in that appeal are scheduled for December 18.

¶12. (SBU) However, several features of Kenya's laws may limit some flexibility in the prosecution. For example, the Kenyan penal code does not specifically address attempted piracy and contains no general attempt provisions that could be read with the piracy provision to support charging the suspects with their attempt to take over the Danish ship. Although we are still researching this issue, Kenya's penal code may not allow prosecutors to pursue the attempt charge.

¶13. (SBU) In addition, the penal code does not define piracy. This should not be a hindrance in the prosecution of the piracy of the Yemeni dhow because the actions in that case can easily be shown to fit within the common, everyday meaning of piracy. However, the lack of a definition in the penal code may hamper future prosecutions, and probably prevents the prosecutions from arguing that unsuccessful piracy attacks, like the attack on the Danish ship, are acts of piracy punishable under Kenyan law. The definition of piracy under international law is sufficiently broad to include unsuccessful attacks. However, although Kenya has signed and ratified several of the relevant international conventions on the law of the sea, it has never incorporated those definitions into its domestic legal framework or otherwise codified the relevant provisions. Accordingly, those conventions do not have the force of law in Kenya, and it would be difficult for the prosecution to rely upon them to argue that the Kenyan law should be read to include attempted acts of piracy. (Note: Indeed, any references made to the definition of piracy in international law may serve only to highlight the lack of definition in the Kenyan statute to the defense. End note.)

¶14. (SBU) The Kenyan criminal procedure and evidence codes also contain features in the areas of confessions, plea agreements, and the admissibility of evidence that will make this case and future cases challenging. For example, although the law regarding confessions has been modified to permit their admission into evidence if they are taken by a magistrate or by a chief of police, this latter method is still rarely used and the procedures therefore are still being worked out. It is unclear whether admissions made to foreign military or law enforcement personnel would be admissible. Also, the Kenyan plea agreement bill is still pending in Parliament. Thus, unlike in the United States, the Kenyan authorities have no ability to reach an agreement with one or more of the pirates to testify against the others in exchange for leniency. This and limitations on the admissibility of confessions means that these types of cases will usually go to trial and will have to be won on the strength of the witness statements and evidence gathered at sea.

¶15. (SBU) In addition, Kenya retains a number of outdated rules on evidence that also hamper prosecution of these cases. The evidence code requires that photographs cannot be admitted into evidence unless they were taken by a police photographer and were kept in the photographer's possession from their development. Although there has been an exception made recently for videotape, this means that photographs taken by the Royal Navy or others at sea likely will not be admissible at trial unless provision is made for the police to download the pictures directly from the British cameras or computers. Kenyan judges also apply stringent requirements regarding the chain of custody of evidence. In general, in the United States, evidence would still be admissible even if

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the prosecution was not able to produce every person who took possession of the evidence or to explain any breaks in the chain of custody of the evidence prior to its being produced in court. Such discrepancies may affect the weight given to a particular piece of evidence, but would not make it inadmissible. Kenyan judges often apply a more stringent standard. Although it should not be a problem in the case of immutable objects such as the weaponry seized from the suspects, these items appear to have been in the custody of British personnel before being handed over to the Kenyan police.

COMMENT

¶16. (SBU) The primary practical issue facing the prosecution in this and future cases is arranging for the trial testimony of the foreign national eyewitnesses. The DPP has asked the RLA to assist the GOK with streamlining the process, but the success of these prosecutions will depend greatly upon the willingness of the eyewitnesses' home countries to facilitate their travel to Kenya for a trial. At present, the piracy case is assigned to an experienced prosecutor in Mombasa, who was part of the team that won the piracy case in 2007. The prosecutor and the RLA have had detailed strategy discussions, and the RLA has committed to provide continuing support and guidance where appropriate. End comment.
RANNEBERGER